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CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 19 OF THE CONVENTION

Second periodic reports of States parties due in 1993

Addendum

COLOMBIA*

[4 August 1995]

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* The initial report submitted by Colombia is contained in document CAT/C/7/Add.1; for its consideration by the Committee, see documents CAT/C/SR.36 and 37 and Official Records of the General Assembly, Forty-fifth session, Supplement No. 44 (A/45/44), paras. 313 to 340. For the additional information submitted by Colombia on 28 August 1990, see document CAT/C/7/Add.10.

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I. GENERAL*

1. The problem of human rights in Colombia goes beyond any explanation that reduces the scope of responsibility to acts or omissions by the Government. At least a brief reference has to be made to the context of complex historical, social and political factors in which it is situated in order to have a better idea of the true situation, which is multifaceted.

2. In the first place, account must be taken of structural factors, such as the country's social and economic inequalities, the weakness of the Government's presence in recently occupied areas, the dynamics of accelerated economic growth in settlement areas and, above all, limitations resulting from the political system which was in force for over 100 years, starting with the 1886 Constitution.

3. Colombia has one of the longest-lasting democratic traditions in Latin America, based on the free play of party politics and power sharing, the absence of military coups, the separation of powers and individual freedoms embodied in the Constitution and governed by law. Poverty levels are lower than those in many nations in the region and there have been significant advances in social indicators in the last 20 years. Guerilla violence has been centred in places where recent economic development has been the most rapid.

4. In addition to structural factors, account must be taken of some specific historical and political factors, which include the existence of a guerilla tradition resulting from the two-party violence that shook the country for several decades and its impact on intellectual, university and trade union sectors, some of which helped to create armed resistance to the political system. This encouraged the development of restrictive procedures, a repressive and symbolic increase in penalties and offences and the strengthening of the most traditional sectors in their different levels of resistance or reaction.

5. Drug-related terrorism, for its part, was to emerge as an unforeseen variable that would dangerously threaten the economic and social system of Colombia, a country which has paid the highest price in the crusade against this multifarious type of crime.

6. As the Government's capacity to offer an institutional solution to conflicts began to be limited, the guerillas and drug traffickers strengthened their economic and war-making power with money and weapons from all over the world, a situation which helped create private forms of justice, as had occurred in the case of self-defence and paramilitary groups.

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* Together with this report, the Government submitted general information on the Republic of Colombia which may be consulted in the archives of the Centre for Human Rights. A similar text on the same subject-matter which was submitted by the Government of Colombia on 12 April 1995 is reproduced in document HRI/CORE/1/Add.56.

7. Since the Government of Colombia has taken on the major task of strengthening political institutions to enable them to cope with current social conditions, it cannot allow short-term solutions if it is to bring about structural changes unprecedented in the history of the country. This also requires a general commitment by society to the creation of a new approach to human rights for which the Government is mainly, but not exclusively, responsible.

8. The new Colombian Constitution was born out of a major democratic debate in which the entire country took part. It is a social covenant, an agreement on the basics, a peace treaty resulting from a dialogue between opposing sides in an atmosphere of tolerance. It embodies over 70 rights covered by 85 articles divided into the following five chapters: fundamental rights; social, economic and cultural rights; collective rights; machinery for the protection and enforcement of rights; and duties and obligations of citizens. In addition to other basic rights, it guarantees the rights of the child, equality, freedom of expression, freedom of the press and information, the right to freedom of assembly and association, the right to privacy and personal autonomy, the right of defence, the right to freedom of conscience and worship and equality of religions, the cultural rights of indigenous peoples and the rights to strike, to collective bargaining, to health and social security, to education and culture and to a healthy environment. It prohibits the following: the death penalty, slavery, traffic in human beings, torture, enforced disappearance, life imprisonment, confiscation and administrative detention.

9. In 1991, the remedy of habeas corpus was also given constitutional status. In accordance with this remedy, persons who are deprived of their liberty and consider their detention unlawful may apply to any judicial authority, either directly or through a representative, for a review, within a maximum of 36 hours, of the lawfulness of the proceedings instituted by the authority and, as appropriate, for immediate release.

II. INFORMATION ON NEW MEASURES AND NEW DEVELOPMENTS (ARTICLES 2 TO 16)

Article 2

10. The Constitution provides that the Government has direct responsibility for giving effect to the principles, rights and duties embodied in it. This is the Government's purpose and the source of its legitimacy, together with the discharge of other functions, such as providing public service, guaranteeing participatory democracy, defending territorial independence and integrity and maintaining public order (art. 2 of the Penal Code). In addition, Government authorities have a duty to protect the life, honour, property, beliefs and other rights and freedoms of all persons residing in Colombia and to monitor the fulfilment of the social duties of the Government and private individuals (art. 2 of the Constitution). Government officials are vested with authority, which they must exercise appropriately and responsibly, subject to penalties for abuses of authority, omissions or acts contrary to this principle.

11. The constitutional provision expressly prohibiting torture is reproduced below and some legislative developments are analysed which are aimed at the establishment of checks and safeguards to prevent and punish this practice, in accordance with the provisions of article 4 of the Convention.

> "Article 12. No one shall be subjected to enforced disappearance, to torture or to cruel, inhuman or degrading treatment or punishment".

12. Constitutional Court judgement No. C-106/95 of 15 March 1995 refers to this article of the Constitution, stating that "the right to personal integrity is directly connected to the right to life. It entails recognition of the dignity of the human being and prohibits torture as an instrument of punishment, intimidation or means of obtaining information" (Judge Eduardo Cifuentes Muñoz).

13. Reference should also be made to the statement by Constitutional Court Judge, Dr. Ciro Angarita, in his ruling No. C-587 of 12 November 1992 that torture may be imputed both to the Government and to private individuals:

> "Torture may be imputed both to the Government and to private individuals. So the right not to be tortured, like the right not to be subjected to enforced disappearance or to cruel, inhuman or degrading treatment, postulates ways in which the actual rights that are to be protected may be violated; the right to personal integrity, autonomy and, in particular, human dignity".

14. The Constitutional Court ruling also states:

> "Article 12 of the Constitution is even broader than the international instruments ratified by Colombia in this regard, since, as stated above, the Colombian Constitution also prohibits torture in cases where the torturer is a private individual.
>
> Thus, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, acceded to by Colombia in Act No. 78 of 15 December 1986, defines torture as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted ... by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.
>
> This international provision nevertheless states that this definition of torture is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application. This is exactly what the Colombian Constitution does in prohibiting torture not only when it is inflicted by a public official or with his consent or acquiescence, but also when it is inflicted by a private individual, as stated in the preceding paragraph of this ruling.
>
> The inclusion in the Constitution of the right not to be tortured, together with the other eventualities set out in article 12, is aimed at protecting the right to personal integrity, whose violation had been a matter of constant concern to high judicial bodies, particularly the Council of State.

> Thus, according to the Constitution, the practice of torture, which is expressly prohibited by the Constitution, may be imputed not only to the Government but also to private individuals. Not only the Government, but also private individuals, must therefore be punished, no matter who has practised torture. This unambiguous conclusion is derived both from the records of the Constituent National Assembly and from the large body of case law that preceded it".

15. As to the situation described in the initial report, the following changes have taken place in this regard.

16. Article 279 of the Penal Code (Decree No. 100 of 1980) was repealed by Decree Law No. 180 of 1988, supplementing some provisions of the Penal Code within the framework of the Statute for the Defence of Democracy, the set of rules on the state of siege that became permanent legislation in order to deal with the many types of violence besetting the country at that time.

17. The 1988 provision increases the penalty for the offence of torture and establishes that anyone who subjects another person to torture is liable to between 5 and 10 years' imprisonment, unless the act constitutes an offence liable to a severer penalty. In addition, Decree Law No. 2790/90 proclaims the Statute for the Defence of Justice and provides that an aggravating circumstance is that the offence was committed against judicial officials, such as ordinary and specialized judges and other participants in criminal proceedings within their jurisdiction. In such cases, those responsible are liable to a term of 15 to 25 years' imprisonment and to a fine equal to between 50 and 200 times the minimum legal monthly wage.

18. The system of criminal justice characterizes torture as a circumstance that increases the penalty for the offence of abduction when it is committed against the victim of the principal offence.

19. In addition to these constitutional and legal provisions, there are safeguards designed to prevent the practice of torture in situations where a person is deprived of his liberty. Procedures relating to arrest and detention contain measures designed to guarantee the integrity of the person concerned during such time as he is deprived of his liberty. The new Code of Criminal Procedure (Decree No. 2700 of 30 November 1991) provides that terms of imprisonment are to be served in places and in the manner provided for by law (art. 45). Failure to comply with the legal requirements constitutes the offence of unlawful deprivation of liberty, which is taken as arbitrary conduct by an official and is liable to a term of one to five years' imprisonment. When a person is arrested, there must be a record that the arresting official: stated the grounds for the arrest, informed the person concerned of and facilitated his right to consult immediately with defence counsel and with the person to be apprised of the arrest. These measures are designed to prevent detention incommunicado by guaranteeing constant contact between the detainee and his lawyers and relatives as a means of helping to prevent torture and cruel and inhuman treatment.

20. In order to ensure that the arrest is carried out in accordance with these legal rules, provision is made for the remedy of habeas corpus (art. 430 of the Code of Criminal Procedure), which protects freedom when the rules have

not been complied with or deprivation of liberty is extended unlawfully. When an unlawful arrest has taken place, the person concerned is entitled to the following guarantees:

(a) He may apply to any judge or magistrate in the place where the unlawful arrest occurred or the place closest to it so that the judge or magistrate may decide, within the next 36 hours at the latest, whether his release should be ordered; the application may be submitted to any judicial officer, but the proceedings are conducted exclusively by the criminal judge;

(b) The remedy may be applied for by third parties on the person's behalf, with no need for a power of attorney;

(c) The proceedings may not be suspended or postponed on account of holidays or court recesses; since promptness is of the essence in this regard, the decision-making process and action on the decision override any contingencies or circumstances which may delay the proceedings. Article 434 of the Code therefore prohibits the application from being referred to another judge.

21. Another important safeguard is that there are provisions which invalidate testimony, confessions or any other evidence obtained by torture. In this connection, the Code of Criminal Procedure states that the following constitute evidence: inspection, expert investigations, documents, testimony and confession.

22. Since testimony and confession are the types of evidence in connection with which a person may be subjected to torture, the requirements that must be taken into account for them to be valid are described below.

23. The official responsible for evaluating the testimony has to take account of the principles of sound judgement in relation to:

(a) The nature of the object perceived;

(b) The state of health of the sense or senses by which the object was perceived;

(c) The circumstances of place, time and manner in which it was perceived;

(d) The personality of the deponent, the way in which he testified and any peculiarities noted in his testimony.

24. The method of interrogation in obtaining testimony is subject to the following rules:

(a) When the witness is present and has been identified, the official swears him in and informs him of the exceptions to the duty to testify;

(b) The witness is informed of the facts about which he is to testify and ordered to give an account of what he knows about them.

25. Article 296 of the new Code of Criminal Procedure requires that, in order to be valid, a confession must meet the following requirements:

(a) It must be made before a court official;

(b) The person concerned must be assisted by defence counsel;

(c) The person must have been informed of his right not to testify against himself;

(d) The confession must be given consciously and freely.

26. A confession in itself is not proper evidence; after it has been given in compliance with the above-mentioned requirements, the competent official will take steps to determine whether it is true (art. 297 of the Code of Criminal Procedure). As in the case of testimony, assessment of the confession's value as evidence is subject to the rules of sound judgement.

27. In order to strengthen existing safeguards in respect of testimony and confession, it is laid down that defence counsel must be present when they are being heard, as a means of preventing unlawful pressures, including torture and ill-treatment. In this connection, attention is drawn to the work of the ombudsman, which is organized and supervised by the Ombudsman's Office, an integral part of the Government Procurator's Office, as provided for in the 1991 Constitution.

28. Owing to constraints on the availability of resources, the court-appointed counsel service provided in pursuance of Decree No. 053 of 1987 and its implementing Regulation No. 2666 of 26 December 1988, centralized the criminal defence service in the prisons with the largest number of inmates, thus making it difficult to provide services for everyone who needed them. One problem with the system was that court-appointed defence lawyers were always Government officials, which led to delays in official proceedings, in the filling of posts and in travel by the officials concerned. The new system is based on contract service and on the conclusion of agreements with the law faculties of the major universities.

29. The work done by the Government Procurator's Office (of which the Ombudsman's Office forms part) in criminal proceedings is carried out by the Attorney-General and the purpose of his involvement is to protect the legal system, public property and fundamental rights and guarantees. In cases which involve violations of a convicted person's human rights, the Attorney-General protects those rights and works together with visiting magistrates in all matters relating to their functions (art. 123 of the Code of Criminal Procedure).

Administrative measures

30. Article 22 of the Organization Statute of the Attorney-General's Office (Act No. 4 of 1990) assigned the Office of the Attorney-General for the Defence of Human Rights the following main functions:

> "(b) To bring disciplinary proceedings, and decide on them in sole instance in connection with participation in acts of genocide, torture and enforced disappearance committed, in the exercise of their functions, by members of the Ministry of National Defence, the Armed Forces, the National Police, officials and staff of bodies belonging to or connected with those institutions, and other officials and employees;
>
> (g) Ensure the protection of human rights in prisons, judicial and police premises and psychiatric institutions".

31. In view of the nature of torture, the law assigned specific jurisdiction to the Office of the Attorney-General for Human Rights without regard for the rank or organization to which the accused person belongs and strengthened such jurisdiction as compared with the previous legal system, according to which the Office of the Attorney-General for Human Rights had jurisdiction only to conduct a disciplinary investigation and turn it over to the competent Office, according to the position of the accused, for a final decision.

32. Torture was also distinguished from other offences to be investigated and punished as violations of human rights, such as personal injury cases, which are heard by other services in the Government Procurator's Office.

33. The Organization Statute of the Public Prosecutor's Office, Decree No. 2699 of 1991. Because the Public Prosecutor was concerned about the human rights of accused persons, and in particular of citizens, in relation to the criminal investigation powers of some officials, he established the disciplinary regime provided for in chapter I, section VII, of Decree No. 2699 of 1991, according to which torture is a disciplinary offence against human rights (art. 21 of Decision No. 017 of July 1992).

Judicial remedies

34. In 1993, the Constitutional Court declared that some of the decrees issued in connection with the state of internal disturbance, including the one which restricted the exercise of the right of habeas corpus (the essential mechanism for preventing torture), were unenforceable in proceedings before the Regional Courts, as was the decree ordering that itinerant criminal investigation police units should be set up comprising members of the armed forces.

35. An important precedent in this regard is the judgement of 16 December 1987 by which the Council of State confirmed the ruling declaring the Ministry of Defence administratively responsible for the mental and physical injuries suffered by Dr. Olga López de Roldán, who had been tortured on military premises in 1979. In a judgement of 5 February 1988, the same high court declared the Ministry of Defence responsible for the death of Marcos Zambrano, who had been tortured by military personnel in 1980.

36. As regards political measures, in December 1991 the National Government set forth its comprehensive policy to combat all types of violence affecting the country, including torture. This policy was embodied in the document entitled "National Strategy against Violence", which gives details of inter-agency coordination activities and the areas of jurisdiction of the various Government bodies in respect of the strengthening of justice and policies to deal with different types of violence and with the protection and promotion of human rights.

Prison and penitentiary system

37. Since persons deprived of their liberty may be subjected to conditions of detention that are contrary to their dignity, as well as to unlawful pressures, the Congress of the Republic adopted Act No. 65 of 1993 embodying the Penitentiary and Prison Code in an effort to monitor compliance with security and protective measures and the enforcement of custodial sentences (art. 1).

38. The guiding principles of the Code relate to the lawfulness of detention, equality before the law, respect for human dignity, the prohibition of penalties such as exile, life imprisonment and confiscation, and the lawfulness of arrest and detention.

39. It also indicates which establishments may operate as places of detention and describes the conditions for admission to each one. Detention establishments are classified as: prisons, penitentiaries, special prisons and penitentiaries, women's detention centres, prisons for members of the security forces, prison farms, reformatories, rehabilitation and other detention centres set up as part of the penitentiary and prison system.

40. The new constitutional provisions establish tighter controls and impose time-limits which make states of exception strictly transitional in nature. They also indicate limitations on Government powers, expressly guaranteeing the non-violation of fundamental rights. This is because the emergency machinery provided for in the former article 121 of the 1886 Constitution was not able to cope with the new factors giving rise to violence.

41. The Constitution brought about a significant change in the state of siege provided for in the 1886 Constitution. The main changes were the following:

(a) Clear-cut concepts: the new provisions on states of emergency make a distinction between the concepts of war and internal disturbance, assigning each one specific consequences and granting the Executive powers for each case;

(b) Temporality: one of the main achievements of the new provisions is that they establish a well-defined temporal framework, 90 days for the first declaration, extendable for up to two equal periods of time, the last of which requires the approval of the Senate. This did away with the indefinite nature of the state of siege, which created institutional instability and constant legal uncertainty. In practice, the time-limit means that the country (or part of it) cannot be under a state of emergency for more than 270 days, during which the Executive has an obligation to take the necessary measures to deal effectively with the cause of the disturbance;

(c) Proportionality and connectedness: the emergency measures taken by the Government must have an actual causal relationship with the occurrences giving rise to the disturbance. The objective effect of the measures thus has to be to eliminate the root causes of the internal disturbance. There must also be proportionality between the threat and the measure taken to attenuate it; otherwise, the door would be open to possible abuses of power;

(d) Political control by Congress: the new provisions strengthen the machinery for political control by the legislature over decisions taken by the Executive in the exercise of these emergency powers. In the first place, the authorization of the Senate of the Republic is required to declare war; secondly, while the state of war exists, Congress retains all its powers and may at any time amend or repeal decrees issued by the Government in the exercise of emergency powers. Under a state of internal disturbance, the prior approval of the Senate is required for the Executive to order the second 90-day extension and it is the Government's obligation to submit a substantiated report to Congress;

(e) Judicial control by the Constitutional Court: the constitutional control over legislative decrees formerly exercised by the Supreme Court of Justice is maintained. This task is now part of the functions of the Constitutional Court (art. 215 of the Constitution);

(f) Normality of Government powers: one of the most negative aspects of a state of siege on the former pattern was the institutional abnormality it reflected, inasmuch as the Executive encroached upon the areas of activity and jurisdiction of the other powers, thus creating a manifest imbalance between the three main branches. The new constitutional provision clearly states that "the normal functioning of the branches of Government power and other Government bodies shall not be interrupted" (art. 214, para. 3, of the Constitution);

(g) Responsibility of the Executive: there are two levels of responsibility, namely, political responsibility, which relates to the rightness of a decision to declare a state of emergency and lies with the President and his ministers; and legal responsibility, which also lies with these officials and, in particular, with those who might be involved in abuses of authority as a result of the exercise of emergency powers;

(h) Non-suspension of human rights: the new Constitution expressly prohibits the suspension of human rights and fundamental freedoms during states of emergency. Since the Constitution does not list the rights protected by the prohibition, it may be said that the provision covers and goes beyond the guarantees in respect of states of emergency provided for in the International Covenant on Civil and Political Rights. In addition, the Constitution orders that the rules of international humanitarian law must be respected in all states of emergency (art. 214). The fact that treaties and conventions which recognize human rights and prohibit them from being restricted during states of emergency take precedence over internal law (art. 93 of the Constitution) means that legislative decrees enacted by the Government are subordinate tc those international instruments. It should nevertheless be noted that there are restrictions and limitations on the

exercise of fundamental rights during states of emergency that are compatible with the will of the authors of the Constitution since they are designed to protect the community. Thus, during a state of war, the restriction of the right to freedom of movement within the national territory may protect other basic rights, such as the right to life and personal integrity;

(i) Prohibition of the trial of civilians by military courts: civilians may not be investigated or tried by military courts. This reaffirms the doctrine of the right to due process of law and defines areas of jurisdiction as a guarantee of human rights.

42. Article 93 of the Constitution provides that international human rights treaties and agreements take precedence over internal law:

> "Article 93: International treaties and agreements, which have been ratified by Congress, which recognize human rights and which prohibit their restriction during states of emergency shall take precedence over internal law".

Fundamental constitutional rights must be included in the context of the public human rights treaties ratified by the Congress of the Republic.

43. Thus, and in conformity with the provisions of the Inter-American Human Rights Convention, which Colombia adopted under Act 16 of 1972, and which enumerates the rights, including the right to physical integrity, that may not be suspended, it follows that in Colombia it is not possible to invoke any circumstances whatsoever to justify torture.

44. Article 91 of the 1991 Colombian Constitution stipulates as follows:

> "Article 91: In the event of a manifest violation of a rule of the Constitution to the detriment of any person whatsoever, superior orders do not relieve the agent exercising them of responsibility.
>
> Serving military personnel shall be exempt from this provision. Where they are concerned, responsibility shall be borne solely by the superior who issues the order."

45. This article, which reproduces article 21 of the 1886 Constitution, concerns the constitutional responsibility that lies with any authority who specifically violates a fundamental right to the detriment of an individual, thereby incurring each and every type of legal responsibility (criminal, disciplinary, civil or administrative), and who may not cite in justification an order, albeit a lawful one, received from a higher authority.

46. Military order and discipline dictate an exception to this constitutional rule for members of the armed forces on active service, in whose case responsibility lies with the superior who gave the order. Nevertheless, this exception may not be interpreted as justifying torture, since the right to physical integrity, as has been observed, is inalienable, and may not be suspended under any circumstances.

47. In this regard, legal doctrine has determined the following requirements for this exception to be applicable to the constitutional responsibilities of public authorities to apply:

(a) The act must be performed in compliance with a military order;

(b) The order must have been given and carried out by serving personnel;

(c) No excesses must have been committed in carrying out the order; and

(d) The order must be binding in that it concerns acts to be performed in connection with military duties, a requirement which by the same token excludes acts that constitute offences. In other words, where the practice of torture is concerned, responsibility rests both with whoever issues the order and with whoever carries it out.

48. In addition, the Penal Code provides that a punishable act is justified if it is committed "in compliance with a lawful order given by a competent authority in due form of law". (Art. 29.) According to criminal law doctrine, the lawfulness of the order is essentially determined by its permissibility. Consequently, an order is binding and exempts the person carrying it out from responsibility solely and exclusively if its content is permissible.

49. This is a sine qua non if the execution of an order by a subordinate is to nullify the criminal nature of the conduct.

Article 3

50. Chapter I of the Constitution, which concerns fundamental rights, begins by asserting in article 11 the inviolability of the right to life, to which it accordingly adds the prohibition of any conduct that implies disregard for that right or involves enforced disappearance or torture, or cruel or degrading treatment, scourges against which progress is being made through the development of policies and the effective implementation of the measures necessary to prevent and punish such human rights violations.

51. Furthermore, regarding the Convention's provisions on extradition, it should be mentioned that the Constitution prohibits the extradition of persons of Colombian nationality by birth, as well as of aliens for political offences or crimes of opinion. In turn, article 17 of the Colombian Penal Code stipulates that "extradition shall be requested, granted or offered in accordance with international treaties", thereby satisfying the requirements of article 3 of the Convention.

52. The same article of Colombia's Penal Code stipulates that in the absence of international treaties, the Government shall request, offer or grant extradition in accordance with what is laid down in the Code of Penal Procedure, whose provisions concerning relations with foreign authorities determine the machinery and procedure for offering or granting extradition.

53. It should be mentioned that all the extradition treaties in force in Colombia contain, in addition to the provisions that constitute their aim and purpose, provisions on the observance of procedural guarantees, and in some cases even specifically prohibit imposing or inflicting corporal punishment or the death penalty upon the person extradited.

54. In the light of the above, we believe that the provisions of article 3 of the Convention against Torture concerning the legislative and administrative procedure in respect of extradition, which also apply to the expulsion or return of a person to another State when there is a risk of his or her being subjected to torture or any other human rights violation, have been complied with.

55. Article 17 of the Colombian Penal Code determines the machinery for extradition:

> "Article 17. Extradition: Extradition shall be requested, granted or offered in accordance with international treaties. In the absence of an international treaty, the Government shall request, offer or grant extradition in accordance with the provisions of the Code of Penal Procedure.
>
> The extradition of Colombians shall be subject to the provisions of international treaties.
>
> In no case shall Colombia offer to extradite its nationals or grant the extradition of persons charged with or convicted of political offences."

56. Article 35 of the new 1991 Constitution introduced a major change in this respect, as it prohibited the extradition of Colombians by birth. Simultaneously, and in conformity with a Colombian legal tradition, it prohibited the extradition of aliens for political offences or crimes of opinion:

> "Article 35. The extradition of Colombians by birth is prohibited. Aliens shall not be extradited for political offences or crimes of opinion.
>
> Colombians who have committed offences abroad, which constitute offences under Colombian legislation, shall be tried and sentenced in Colombia."

57. The Constitution categorically rules out the possibility of extraditing either Colombians by birth, or aliens when political offences are concerned, a provision that is in conformity with those of article 3, paragraph 1 of the Convention. In this regard, we may cite a decision of the criminal court of cassation of the Supreme Court of Justice, dated 26 May 1992:

> "The characteristics of political offences. If ordinary offences are compared with political offences, it has been observed that subjectively, where the former are concerned, the offender is almost always inspired by base motives, or under the influence of intemperate

passions, and acts out of perversity or in order to seek vengeance. In the case of the latter, on the other hand, the motives are almost always political or of public concern; the desire to change the economic, political and social conditions of a community are, as a general rule, the decisive factors where such offenders are concerned.

While those are the characteristic features of this type of offence, it should be specified that:

1. The offence always involves an attack upon the political and institutional organization of the State;

2. It is committed in a manner designed to achieve the maximum social prominence and political impact;

3. It is committed actually or ostensibly in the name and on behalf of a social or political group;

4. It is motivated by identifiable philosophical, political or social principles; and,

5. It is committed in pursuit of actual or purported socio-political ends.

Clearly, then, a political offence has a specific juridical target against which its action is aimed or directed: the State, as a political person or institution. Some consider that what are known as offences against the existence and security of the State and offences against the constitutional regime fall into this category.

It is equally clear that political offences are committed in a particular manner and possess characteristics distinct from their specific content, albeit closely linked to it: the repercussions, the inspiration and the motivation that are invariably and inseparably associated with them. These characteristics are manifested in: seeking to achieve maximum publicity; acting in the name of a sector of society or of political opinion; and doing so under the dialectical banner of a mass movement to achieve a specific socio-political aim.

Consequently, independently of the nature of the act itself, a political offence has a specific purpose and a manner of commission that is peculiar to it and unmistakable."

58. In addition to the above, and in order to ensure the observance of this article of the Convention, Volume Five, Title I, Chapter III of the Code of Penal Procedure lays down strict procedure whereby the Government is authorized to offer or grant extradition, but which requires the prior consent of the Supreme Court of Justice.

59. The Government agency responsible for taking the relevant decision is the Ministry of Justice but, since the request must be made through diplomatic channels, and in exceptional cases through consular channels or from Government to Government, the Ministry of Foreign Affairs is required to

give its views on the desirability of granting the extradition in accordance with international agreements or usage or whether the provisions of the Code of Penal Procedure should apply.

Article 4

60. In our consideration of article 2 of the Convention the constitutional and legal norms which characterize and penalize the offence of torture were summarily described and aspects relevant to the contents of this article were explored and updated with reference to the 1991 Constitution and the new Code of Penal Procedure.

61. Article 279 of the Penal Code, as amended by Decree No. 180 of 1988 stipulates as follows:

> "Article 279: Anyone who subjects another person to physical or mental torture shall be liable to between five (5) and ten (10) years' imprisonment, unless the act constitutes an offence liable to a heavier sentence."

62. In Colombia criminal proceedings may be brought in respect of the offence of torture when a person has been tormented by individuals who are not even indirectly connected with the State. The law does not require the perpetrator of the criminal act to be a public employee.

63. Colombian legislation classifies the offence of torture under the chapter relating to protection of the legal right to individual autonomy, which signifies the enjoyment of self-determination in the sphere of personal freedom.

64. As the initial report by the Government of Colombia dealt in detail with the issues of complicity and participation in torture, in respect of which there have been no legislative changes, we shall not take them up in this report. However, as regards the authority competent to try, investigate and punish the offence of torture, it should be mentioned that Colombian legislation distinguishes between torture affecting a political leader, a leading member of a civic or legal committee, a journalist, a university professor, a trade-union leader, specific public authorities or any inhabitant of the national territory on account of their political or partisan beliefs or opinions, and torture of any other citizen. Pursuant to article 71 of the Code of Penal Procedure and in conformity with article 4 of Decree No. 2266 of 1991, the Regional Court, comprising in the first instance the regional prosecutors and judges, and in the second instance the National Court, tries cases of torture affecting the persons designated by law in virtue of their public, political or professional activity as mentioned above, the penalty for which ranges from 15 to 25 years' imprisonment (Decree No. 2790 of 1990, art. 8). Responsibility for investigating acts of torture against other citizens lies with the ordinary courts, i.e. with the sectional prosecutors and the circuit courts in the first instance, and the Higher Judicial District Courts in the second instance.

65. It should be noted that most cases of torture are not investigated separately, but in connection with criminal proceedings concerning offences such as homicide or abduction, etc. This is due to the conceptual difficulty posed by torture, which in most cases is clearly a means of achieving a specific end (information or confession) and not an end in itself.

66. As regards punishment of the crime of torture, it is important to emphasize the legislator's concern to impose a penalty consistent with the seriousness of the physical pain or mental anguish caused, a concern which is apparent in the significant increases in the severity of sentences in recent years. Thus Decree-Law No. 100 of 1980, the current Penal Code, laid down a sentence of from one to three years' prison for torture. Subsequently, by Legislative Decree No. 180 of 1988, article 24, the sentence was increased to between 5 and 10 years' prison. Finally, Decree No. 2790 of 1990, article 8, stipulated that the crime of torture, jurisdiction over which lies with the Regional Court, carries a sentence of from 15 to 25 years' prison and a fine of from 50 to 200 times the minimum wage.

Article 5

67. The essential purpose of article 5 of the Convention is to ensure the establishment of jurisdiction in order to punish torture and other cruel, inhuman or degrading treatment or punishment. The establishment of jurisdiction is closely bound up with the juridical concept of the scope of application of criminal law. In this connection, it should be noted that in article 13 of the Penal Code, Colombian criminal law clearly determines its spatial scope by reference to the concept of territoriality:

> "Article 13: Colombian criminal law shall apply to any person who infringes it in Colombian territory, with such exceptions as are established in international law.
>
> The offence shall be deemed to have been committed:
>
> 1. At the place where all or part of the act occurred;
>
> 2. At the place where the act which should have occurred did not occur; and
>
> 3. At the place where the result occurred or should have occurred."

68. The concept central to this rule is "territory", which has been expounded in legal doctrine and whose legal scope has been determined as signifying any part of the space and all the objects over which the State exercises its rule. These are, in detail:

(a) As regards the space:

(i) The territorial soil and subsoil;

(ii) The continental sea and territorial waters;

(iii) The airspace.

(b) The objects:

(i) Vessels owned by the State and private vessels flying the Colombian flag;

(ii) Aircraft owned by the State and private aircraft registered in Colombia.

69. This principle of the scope of application of Colombian criminal law is a development of article 4 of the Constitution, paragraph 2 of which lays down the obligation to abide by the Colombian legal order:

"Colombian nationals and aliens in Colombia are required to abide by the Constitution and law and to respect and obey the authorities."

70. Moreover, article 95 of the Constitution lays down what are known as civic duties, which include the following:

"... Everyone is obliged to comply with the Constitution and laws.

Individuals and citizens have the following duties:

1. To respect the duties of others and not to abuse their own.

2. To act in conformity with the principle of social solidarity.

3. To respect and support the democratically chosen authorities."

71. Finally, article 57 of the Code relating to the Political and Municipal Regime states as follows:

"The laws are binding on all the country's inhabitants, including aliens, whether domiciled in Colombia or temporary residents, with the exception, in the case of the latter, of such rights as are conferred by international treaties."

72. In addition to the establishment of criminal jurisdiction for offences committed on the territory, article 5, paragraph 1 (a) also provides for the establishment of jurisdiction over offences committed "on board a ship or aircraft registered in that State;". In compliance with this treaty obligation, article 14 of the Colombian Penal Code provides for what is known as "extended territoriality" which it defines as follows:

"Colombian criminal law shall apply to anyone who commits a punishable act on board a Colombian naval vessel or military aircraft which is outside Colombian territory.

It shall also apply to anyone who commits a punishable act on board any other Colombian aircraft or vessel on the high seas, if criminal proceedings have not been instituted abroad."

73. Lastly, article 15, paragraphs 2 to 6 of the Penal Code establishes the notion of the extraterritoriality of Colombian criminal law, which satisfies the requirements of article 5, paragraphs 1 (b) and (c) and 2 of the Convention against Torture.

"Article 15: Extraterritoriality. Colombian criminal law shall apply:

1. To a person who commits an offence abroad against the existence and security of the State, the regime of the Constitution, the social economic order, public health or the public administration, or who falsifies Colombian currency, a public credit document, stamped paper or an official stamp, even if that person has been acquitted abroad or sentenced abroad to a lesser penalty than provided by Colombian law.

In all cases any time for which that person has been in custody shall count towards the time for which the penalty is to be served.

2. To a person in the service of the Colombian State who enjoys immunity under international law and commits an offence abroad.

3. To a person in the service of the Colombian State who does not enjoy immunity under international law and commits an offence abroad other than one of the offences mentioned in article 15 (1), and who has not been tried abroad.

4. To a Colombian citizen who, except in the circumstances provided in the preceding sections, is in Colombia after having committed an offence in foreign territory which under Colombian criminal law is punishable with a custodial penalty of not less than two years, and who has not been tried abroad.

If the penalty is a lesser one, proceedings shall not be taken except on complaint or on the application of the Attorney-General of the Nation.

5. To an alien who, except in the circumstances provided in article 15 (1), (2) and (3), is in Colombia after having committed an offence abroad prejudicial to the State or to a Colombian citizen which under Colombian law is punishable with a custodial penalty of not less than two years, and who has not been triad abroad.

In this event proceedings shall not be taken except on complaint or on the application of the Attorney-General of the Nation.

6. To an alien who has committed an offence abroad prejudicial to another alien, if and only if:

(a) He is in Colombian territory;

(b) The offence is one which in Colombia is punishable with a custodial penalty of not less than three years;

(c) The offence is not a political offence; and

(d) An application has been made for extradition, and extradition has not been granted by the Colombian Government. Should extradition not have been accepted there will be no case for criminal proceedings.

In the event referred to in this section, proceedings shall not be taken except on complaint or on the application of the Attorney-General of the Nation, and only if the offender has not been tried abroad."

74. Legal doctrine has observed in respect of this norm that paragraph 2 develops the principle of "active personal jurisdiction" as it provides that the country's criminal law shall apply to anyone who, while enjoying immunity and being in the service of the State, commits a violation of the legal rights of Colombian citizens or aliens (in the case of torture), of the Colombian State or of any other State. This provision is hardly logical, as the immunity to which the person is entitled precludes his being subject to the criminal law of the State in which he committed the offence, particularly when a Colombian citizen is concerned. However, if the person who meets the requirements is an alien, the "objective or defensive principle" is invoked, as the purpose of applying national law is to safeguard the interests of the State.

75. Paragraph 3 also enshrines the principle of "active personal jurisdiction" by postulating that the criminal law applies to anyone - regardless of whether he is a national or an alien - who, without being entitled to diplomatic immunity, commits an offence (such as torture) other than those set out in paragraph 1. Naturally, if the person is an alien, the country's criminal law applies by virtue of "objective or defensive jurisdiction" which is the reason for adding the words "who has not been tried abroad".

76. Paragraph 4 requires that Colombian criminal law apply to Colombians present in Colombia after having committed abroad a crime that carries a custodial sentence of not less than two years (torture carries a minimum custodial sentence of five years) provided they have not been tried abroad.

77. The "objective or defensive principle" is developed in paragraph 5, which stipulates that Colombian criminal law applies to aliens who, after having committed an offence against the legal rights of the State or of its citizens which is liable to a custodial sentence of over two years (as in the case of torture) is in Colombia and has not been tried abroad. It is moreover a prerequisite that a complaint shall have been lodged by or at the request of the Attorney-General.

78. Lastly, the "principle of universal jurisdiction" is covered by paragraph 6, which safeguards the interests of other nations and of the international community whensoever they have been injured by aliens present in Colombian territory, provided the offences are not political ones. In this case too, a complaint has to be lodged by or at the request of the Attorney-General, and if an application for extradition has been made, it must have been refused by the Colombian Government.

Article 6

79. The classification of the conduct in question is dealt with in article 256 of the Penal Code for the Armed Forces, which covers both physical and mental torture. The article states:

> "Anyone who subjects another person to physical or mental torture shall be liable to between one (1) and three (3) years' imprisonment, unless the act constitutes an offence liable to a heavier sentence."

80. According to article 169, paragraph 1 of decree No. 2550 of 1988, the current Penal Code for the Armed Forces, under the heading "Offences against international law", "forcing a prisoner of war to fight against his own country, or subjecting him to physical or mental ill-treatment", constitutes a breach of international law.

81. The section on "arrest", paragraphs 14 ff, of ministerial Instruction No. 007 of 1993, issued by the Minister of National Defence to regulate the operation of the anti-extortion and anti-abduction units (UNASE), establishes as part of the procedure the obligation to inform the arrested person or the offender who is caught in flagrante delicto of his rights, as set forth in the Constitution and the law and also the obligation to draw up a formal record of the provision of information on the rights of the arrested person.

82. In its official letter No. 4150-MDEPSG-725 of 9 May 1994, the Office of the Secretary-General, upon the instructions of the Minister of Defence, issued directives for strengthening the system for the defence of the human rights of each and every member of the institution. Under standing instruction No. 018 dated 25 May 1994, the Ministry of National Defence provided for the restructuring and expansion of its office of human rights, and for the creation of such offices within the armed forces.

83. Under the terms of standing instruction No. 100-3 of 3 June 1994, the Armed Forces High Command issued instructions for the creation of human rights offices within the armed forces in order to determine functions and optimize their coordination in the handling of this matter. Through temporary instruction No. 029 of 30 September 1994, directives were issued for the launching of a special campaign for the armed forces, promoted by the Ministry of Defence in coordination with the Presidential Advisory Council for Defence, Protection and Promotion of Human Rights, to eradicate all types of abuses and violations on the part of uniformed staff and to strengthen educational programmes that render more steadfast and unshakeable the values by which all uniformed personnel should be guided both in the performance of their functions and when off duty.

84. Extradition is to be understood as the act by which a State hands a person over to another State that so demands with a view to putting that person on trial or to carrying out a sentence, should the person have already been tried and sentenced. None the less, as has already been stated, the Constitution allows only for the extradition of aliens, thereby prohibiting the extradition of native-born Colombians:

"Article 35. The extradition of native-born Colombians is prohibited. The extradition of aliens for political crimes or for their opinions shall not be permitted.

Colombians who have committed crimes abroad which are considered as such under national legislation shall be tried and sentenced in Colombia."

Article 7

85. The discretionary power exercised by the national Government in deciding whether to offer or grant the extradition of a person who has been sentenced or tried abroad in no way constitutes a protection for accused persons or a mechanism of impunity. Article 25 of the Code of Penal Procedure makes it the duty of every inhabitant of Colombian territory over 18 years of age to inform the authorities of punishable acts of which they might have knowledge and which should be investigated officially, as is the case with torture, which is not on the list of offences that require a complaint to be filed given in article 33 of the Code. For public officials which designation applies to those who decide on the extradition proceedings, this duty includes initiating the investigations without delay, if they are competent to do so, or bringing them to the attention of the competent authorities.

86. In addition to the above-mentioned constitutional prohibitions, article 565 of the Code of Penal Procedure stipulates that there shall be no extradition when the person whose surrender is requested is being investigated or has been sentenced for the same crime in Colombia.

87. The right of defence may be exercised by the defendant himself or through his counsel, as laid down in article 567 of the Code of Penal Procedure:

"Article 567 - Right of defence. As soon as extradition proceedings commence, the person shall have the right to designate an advocate, and if he does not do so counsel shall be appointed for him by the court."

88. The procedure further ensures the conditions for a fair and impartial trial with the full exercise of due process:

"Article 556 - Procedure. Once the file has been received by the court, a copy is transmitted to the person whose extradition is requested, or his counsel, who are allowed 10 days in which to request any evidence deemed necessary. Once that period has expired, a period of 10 days, to which should be added any time required for travel, shall be devoted to the consideration of the evidence requested, as well of any other evidence which the court deems necessary for its decision.

Once the evidence has been assembled, the case shall remain in the hands of the office of the court for five days for pleadings.

Article 557 - Opinion of the court. When the aforesaid period has ended, the court shall issue its opinion.

A negative opinion of the Supreme Court of Justice shall be binding on the Government; if, however, that decision is in favour of extradition, it shall leave the Government free to act in accordance with the national interest.

Article 558 - Legal grounds. The court shall base its decision on the formal validity of the documentation submitted; on full proof of the identity of the wanted person; on the rule of double jeopardy; on the equivalence of the ruling issued abroad; and, where appropriate, on compliance with the provisions of international treaties.

Article 559 - Decision to refuse or grant extradition. Once the file containing the opinion of the Supreme Court of Justice has been received, the Ministry of Justice shall have a period of 15 days within which to issue its decision either to grant or to refuse the extradition request."

It should be added that against such decisions the remedies are designated in our legislation as governmental measures are applicable prior to approaching the administrative jurisdiction court for an action for annulment.

89. Chapter III, article 279, of the Colombian Penal Code, concerning offences against the autonomy of the person, contains the following provision:

"Article 279 - Torture: Anyone who subjects another person to physical or mental torture shall be liable to between one (1) and three (3) years' imprisonment, unless the act constitutes an offence liable to a severer penalty."

The Penal Code for the Armed Forces deals with this offence in the same terms.

90. In accordance with the forgoing, one may conclude that in order to implement article 7 of the Convention, in both ordinary and military courts, there exist legal provisions applicable to torture as a crime. Similarly, our legal system contains provisions concerning attempted crimes and joint participation, which are applicable to all crimes defined under Colombian law. These categories therefore broaden the scope of the types of crimes by describing behaviours that precede the act, in the case of attempted crimes, or by indicating the possibility of joint responsibility of the subjects, in the case of joint participation.

91. With regard to due process and the right to fair treatment at all stages of the proceedings, Colombian law takes as its point of departure the guidelines (based on the constitutional system) applicable to all types of legal and administrative actions, including the following:

(a) Due process. No one may be tried except in conformity with laws that predate the act of which he or she is accused, before a competent judge or tribunal, and in accordance with the procedure appropriate to each case;

(b) Presumption of innocence. Every individual is presumed innocent and shall be treated as such as long as there has been no court pronouncement as to his or her criminal liability;

(c) Right of defence. Anyone who is accused is entitled to the rights of the defence and to the assistance of counsel of his own choosing or appointed by the court;

(d) Recognition of human dignity. Every individual has the right to be treated with due respect for the inherent dignity of the human being;

(e) Habeas corpus. This may be invoked when a person is arrested in violation of constitutional or legal guarantees, or when the deprivation of his liberty is prolonged illegally;

(f) The rule of law. In their decisions, judicial officers are bound only by the provisions of the Constitution and the law;

(g) Res judicata. No individual whose situation has been determined by a duly enforceable judicial sentence may be retried for the same act;

(h) Double-hearing principle. Every judicial decision may be appealed before a higher court, except that when the accused is the sole appellant, the higher court may not impose a heavier penalty.

92. Inasmuch as these principles have been established and are applied as such in criminal trials, the Colombian Government considers that article 7 of the Convention is fully complied with.

Article 8

93. Colombia has concluded both bilateral and multilateral extradition treaties, of which the following are in force:

- Convention on the Reciprocal Extradition of Offenders between New Granada and the French Republic, signed at Bogotá on 9 April 1850;

- Treaty of Extradition with Great Britain, signed at Bogotá on 27 October 1888;

- Convention on Extradition of Offenders with Spain, signed at Bogotá on 23 July 1892;

- Agreement on Extradition signed at Caracas, Venezuela, on 18 July 1911 in the Bolivar Congress;

- Convention on Extradition with Belgium, signed at Brussels on 21 August 1912;

- Supplementary Convention to the Extradition Treaty with Belgium, signed at Bogotá on 21 November 1931;

- Supplementary Convention to the Extradition Treaty with Belgium, signed at Bogotá on 24 February 1959;

- Treaty of Extradition with Chile, signed at Bogotá on 16 November 1914;

- Treaty of Extradition with Panama, signed at Panama on 24 December 1927;

- Treaty of Extradition with Costa Rica, signed at San José de Costa Rica on 7 May 1928;

- Treaty of Extradition with Mexico, signed at Mexico City on 12 June 1928;

- Supplementary Treaty to the Treaty of Extradition with Great Britain, signed at Bogotá on 2 December 1929;

- Treaty of Extradition with Nicaragua, signed at Managua on 25 March 1929;

- Treaty of Extradition with Cuba, signed at Havana on 2 July 1932;

- Convention on Extradition signed at Montevideo, Uruguay, on 26 December 1933 at the Seventh American International Congress;

- Treaty of Extradition with Brazil, signed at Rio de Janeiro on 28 December 1938;

- Treaty of Extradition with the United States of America, signed at Washington on 14 September 1979.

94. In its initial report on the Convention, Colombia provided information on the applicability of the bilateral and multilateral international treaties to which it is a party. It should be added that in the period under review, Colombia has neither negotiated nor signed any other extradition treaty.

Article 9

95. Relations between the Colombian authorities and foreign governments regarding the application of penal law and of legal cooperation in general are regulated by the provisions of international treaties, international conventions, intergovernmental agreements and internationally accepted usage, and for any matters not covered by such instruments, or in the absence thereof, the Code of Penal Procedure is applied.

96. The elaboration of agreements on different areas of the law unquestionably contributes to clearer and more efficient action on the part of the competent institutions to provide society with the instruments needed to regulate relations between individuals or between individuals and the State. In the penal field proper, judicial cooperation is becoming one of the most important means of facilitating the administration of justice in Colombia, as in other countries.

97. The dynamics of crime make it imperative that countries respond quickly and that they keep in view the need to update and intensify at both bilateral and multilateral level, exercises in cooperation and mutual legal assistance.

98. Although the legal substructure exists for managing international relations in all matters concerned with the application of criminal law, a subject dealt with by the Colombian Penal Code, the establishment of a system of international cooperation in this area, translated into bilateral and multilateral instruments, is designed to endow the judicature with greater flexibility and resources through rapid and effective interchange of information and evidence, indispensable to the authorities of each State in trying criminals.

99. In addition to efforts in the international domain, the Government has backed up this policy by the implementation of seven domestic strategies aimed at improving public acceptance of the judicial system namely: developing the role of the justices of the peace; settling disputes outside of the courts; refining alternative methods for conflict resolution; State legal aid; developing constitutional actions (known as popular actions and actions of compliance); the democratization of legal information (law and case law); and the creation of "houses of justice", all of which strategies entail close relations with the community.

100. Likewise, in order to enhance public participation in modernizing the Colombian justice system, the Government is endeavouring to encourage the development of non-governmental organizations founded specifically to support and monitor the legal sector and to prepare technical studies for promoting the efficiency and accessibility of the courts.

101. All these initiatives fall within the framework of the plan known as "justice for people", which embodies specific development proposals for the various institutions in the sector, and which complements the National Development Plan for the period 1994-1998.

Article 10

102. Concerning article 10 of the Convention, the armed forces' penal procedure contains clear provisions on methods of obtaining testimony; article 532 prohibits the use of violence to obtain statements; and article 594 guarantees the defendant the right to be interrogated free of any pressure and without taking an oath, in accordance with the dictates of due process as set forth in article 28 of the Constitution.

103. Likewise, the Armed Forces High Command has laid down guidelines for subordinate units, based on the human rights policies emanating from the Office of the President of the Republic:

1. Presidential instruction No. 3 of 3 May 1993

   Subject: Security for the people

   Purpose: To define the responsibility of State agencies in the development of the second stage of the national strategy against violence.

2. Standing instruction No. 100-6 CGFM-EMCD1-J-572 of 22 September 1994

Subject: Instructions on human rights

Purpose: To implement activities on fundamental aspects of human rights and to issue instructions for the reinforcement of programmes on the dissemination of information on and promotion of respect for human rights among members of the armed forces.

3. Circular No. 85272-CEDE5-DH-345 of 5 April 1994

Subject: Dealing with criminal subversion

Purpose: Measures to deal with the continual offences committed by subversive groups against members of the armed forces and the civilian population.

4. Temporary instruction No. 100-2 CGFM-EMCD1-571 of 13 May 1994

Subject: Human rights information dissemination campaign

Purpose: To issue instructions for developing the dissemination campaign to be conducted by the Armed Forces High Command for the purpose of disseminating programmes concerning information on and respect for human rights among members of the armed forces.

5. Official letter No. 003354-EMCD1-DH725 of 20 May 1994

Subject: Human rights coordination system

Purpose: To issue instructions for strengthening the defence of human rights among members of the armed forces who are victims of subversion and delinquency.

6. Standing instruction No. 018 MDN-ASP-725 of 25 May 1994

Subject: Creation, restructuring and expansion of the armed forces office of human rights

Purpose: To restructure and expand the human rights office within the Ministry of Defence and create corresponding offices in the armed forces in order to determine functions and optimize their coordination in dealing with the matter.

7. Standing instruction No. 100-3-CGFM-EMCD1-DH-725 of 3 June 1994

Subject: Creation of human rights offices

Purpose: To issue instructions for the creation of human rights offices in the armed forces in order to determine functions and optimize their coordination in dealing with this matter.

8. Temporary instruction No. 0023-MDN-ASP-725 of 6 July 1994

Subject: Executive seminar on military justice and human rights

Purpose: To issue instructions for conducting the "executive seminar on military justice and human rights" to be held by the Ministry of National Defence from 25 to 29 July 1994 for military personnel, the national police and members of government agencies.

9. Temporary instruction No. 021-CGFM-CEFLU-336 of 14 July 1994

Subject: Plan for human rights education

Purpose: To issue orders for providing human rights education.

10. Standing instruction No. 973-COFAC-IGEFA-725 of 29 August 1994

Subject: Establishment of an Office for Human Rights

Purpose: To provide instructions for establishing offices responsible for human rights in the Air Force, with a view to determining functions and optimizing their coordination in dealing with this matter.

11. Temporary instruction No. 028-MDFN-514 of 30 September 1994

Subject: Campaign for the observance of Human Rights

Purpose: To issue instructions for a special campaign in the armed forces, promoted by the Ministry of Defence in coordination with the Presidential Advisory Council for Defence, Protection and Promotion of Human Rights, for the purpose of eradicating all types of abuses and/or violations by armed forces personnel and reinforcing the educational programmes which will render more steadfast and unshakeable the principles and values which all armed forces personnel should manifest in the performance of their duty and off duty.

12. Circular No. 18260-CG-ING-DH-725 of 27 March 1995

Subject: Mechanisms for operating human rights offices

Purpose: Deployment by the Commanders of the various forces of efficient action for dissemination of information, preparation of staff, and organization of the offices themselves in order to prevent undermining of the fundamental principles embodied in articles 93, 94, and 222 of the Political Constitution of Colombia.

Article 11

104. The Presidential Advisory Council for Defence, Protection and Promotion of Human Rights is carrying on with its teaching activity with a view to creating a human rights culture, based on respect for fundamental freedoms and specific guarantees of the fundamental rights of the individual. The 1991 Constitution makes the Office of the Ombudsman the State institution directly responsible for the dissemination of information on human rights, a function which it performs through the National Directorate for the Promotion of and Dissemination of Information on Human Rights. The task of this Directorate is to disseminate knowledge of human rights in the different sectors of the State and society, and give guidance and instruction on the exercise and protection of these rights to all the inhabitants of Colombia.

105. In order to comply with its constitutional mandate, the Office of the Ombudsman has, inter alia, planned a human rights training programme for public officials. The aim is to give the latter the theoretical and practical information they need in order to implement correctly the policy on the recognition, protection and application of human rights. Specific courses have been planned for the following groups of officials: district attorneys and their staff; members of the police force; members of the corps of prison guards. The courses are structured on the basis of three broad areas of study:

(a) Basic concepts: notions, exercise and limits of human rights;

(b) Constitutional law applicable to human rights;

(c) International law applicable to armed conflicts.

Article 12

106. In the section corresponding to criminal prosecution, the Code of Penal Procedure grants exclusive power in this matter to the State as represented by the Attorney-General of the Nation during the pre-trial investigation stage, and to the competent judges during the public phase of the proceedings:

> "Article 25. Entitlement to conduct criminal proceedings. Criminal proceedings are the responsibility of the State and are conducted exclusively by the Office of the Attorney-General of the Nation during the pre-trial investigation stage and by the competent judges during the trial stage on the terms laid down in this code. In exceptional cases this entitlement is exercised by Congress."

107. Officials competent to hear criminal cases have the duty to initiate criminal proceedings when they are apprised by any of the following means that a punishable act has been committed: denunciation, complaint, report, confidential information, public knowledge, personal knowledge or any other means of information.

108. In order to initiate criminal proceedings for the offence of torture, no complaint by a party is required; in other words, the officer of the law has the duty to initiate proceedings proprio motu when he learns by any means whatsoever that such an unlawful act has occurred.

Article 13

109. In the last two reports submitted by the Office of the Attorney-General of the Nation on human rights it was stated that, in view of the serious nature of the offence, complaints of torture undergo a very stringent investigation because the diversity of the alleged acts, which range from simple ill-treatment to torture proper, makes it extremely difficult for the investigator to determine whether he is dealing with a case of bodily harm or a case of genuine torture. In either case, however, the preliminary proceedings to establish the reality of the facts and the identity of the perpetrators are the responsibility of the Special Investigations Bureau, a subdivision of the Office of the Attorney-General with criminal investigation powers and personnel trained for this type of investigation.

110. It should be noted that the biggest increase in human rights complaints by ordinary citizens to the Office of the Attorney-General has concerned torture, reported acts of which increased by at least 23 per cent in 1993-1994 compared with 1992, according to the analysis of the data recorded in the most recent report on human rights submitted by the monitoring body. It is worth noting in this regard that, according to the report from the Human Rights Data Bank of the Centro de Investigaciones de Educación Popular (popular education investigations centre) (CINEP), 21 cases of torture were reported in Colombia between January and October 1994.

111. With regard to the measures which the States parties undertook to adopt for the protection of anyone submitting a report or a complaint of torture and their witnesses, Decree 2699 of 1991 assigns this responsibility to the Office of the Attorney-General of the Nation, through its Office for the Protection of Victims and Witnesses Assisting Them.

112. Act 1044 of 30 December 1993 set up the "Programme for the protection of witnesses, victims, persons involved in the cases and officials of the Office of the Attorney-General of the Nation", whereby "full protection and social assistance will be granted to such persons and their relatives to the fourth degree of blood relationship, the first degree of relationship by marriage, and the first degree of civil relationship, and to their spouses or permanent partners, if they are at risk of aggression or their lives are in danger because or at the time of their participation in criminal proceedings" (art. 63). The persons covered by this programme may be accorded physical protection, social assistance, a change of identity and of domicile, and other temporary or permanent measures designed to guarantee adequately the preservation of their physical and moral integrity and that of their families. When the circumstances so require, the protection may include a transfer abroad, including travel and subsistence expenses for the period and under the conditions indicated by the Office of the Attorney-General of the Nation (Act 104, art. 65 of 1993). Lastly, the Protection Programme may also cover witnesses who take part in investigations conducted by the Office of the Attorney-General of the Nation concerning acts serious enough to be regarded as atrocities.

Article 14

113. The legal system embodies clearly defined procedures for obtaining fair and adequate compensation not only for acts of torture but also for any other type of abuse committed by public officials. The commonest of these procedures, and the quickest and most effective way of obtaining satisfaction, is to bring a direct indemnity action before the administrative jurisdiction courts. This judicature has courts competent to hear cases in each of the departments into which the country is divided politically, and is assisted by the Council of State which is the highest authority in this area of the law.

114. Awards under direct indemnity action procedure provide for two types of compensation for victims or their relatives:

(a) Compensation for moral damage, calculated in grams of gold;

(b) Compensation for material damage caused, including luerum cessans and damnum emergens.

115. The Political Constitution of 1991, article 90, provides for the possibility of State claims for restitution from a public official who causes damages of this nature. The Constitution states:

> "Article 90: The State will answer materially for the extralegal damages for which it is responsible, caused by deeds of commission or omission of the public authorities. In the event that the State is ordered to make compensation for some damage or another, which may have been the consequence of the fraudulent or seriously criminal behaviour of one of its agents, the former will have to claim restitution from the latter."

This mechanism ensures that compensation for damage paid by the State does not become a screen for the illegal activities of some of its officials.

116. The Code of Penal Procedure, articles 43 to 55, deals with criminal indemnification proceedings as part of ordinary criminal proceedings, in the following terms:

> "Individual or collective criminal indemnification proceedings for compensation for damage or injury caused by punishable acts may be brought before the civil courts or as part of criminal proceedings, at the discretion of the injured parties, whether natural persons or legal entities, or by their heirs or successors, or by the Government Procurator's Office or the Ombudsman when collective interests are affected."

117. Colombian case-law (Supreme Court of Justice, plenary division, sentence of March 1990), specifies the recourses available to the bringer of the criminal indemnification action:

> "... the injured party does not necessarily have to resort to criminal proceedings in suing for compensation for the damages suffered, since articles 37 and 39 of the Code of Penal Procedure (corresponding to

articles 43 and 45 of the new Code) give him the right of direct recourse to the civil court, as is necessarily the case when the act is not classified as criminal but has caused injury.

The right to request compensation for damages caused by the offence is thus not then subject to the result of the corresponding criminal proceedings. The bringer of the indemnification action may choose one of the following options in order to obtain effective compensation for the damage:

(a) Institute indemnification proceedings before the civil court from the moment when the allegedly illegal act takes place, in which case the result of the indemnification action is independent of the result of the criminal action; however, if the civil action is initiated after judgement has been given in the criminal case, that judgement creates res judicata in the civil proceedings if it is recognized that the act alleged to have caused the injury did not take place, or that the accused did not commit it, or that he acted in the performance of a legal duty or in lawful self-defence.

(b) Initiate the indemnification action as part of the criminal proceedings, in which case the result of the plaintiff's action depends on what is decided in the latter."

118. The Constitutional Court has ruled that in military criminal procedure it shall be mandatory for criminal indemnification proceedings to be brought as part of the military criminal proceedings so that the victims or their relatives may by this means claim compensation for the damage caused. The Constitutional Court ruled as follows in a custody judgement on 15 June 1994:

"... similarly, this Court has pointed out that article 229 of the Charter should be brought into line with article 13 idem, so that the right of 'access' on an equal footing to the courts means not only an equal opportunity of being admitted to the courtroom but also the right to identical treatment from magistrates and courts vis-à-vis similar situations. It therefore constitutes unjustified discrimination that persons who are victims of or have been injured by offences investigated by the ordinary criminal courts should have access to criminal indemnification proceedings, while those who are victims of or have been injured by unlawful acts investigated by military criminal courts cannot do so.

In view of the above, the Court considers that if a person has been a victim of or has suffered injury from an act investigated by a military criminal court, he has right of access to criminal indemnification proceedings."

119. It should also be noted that a reform of the Code of Military Criminal Justice is currently in progress whereby criminal indemnification proceedings become mandatory within that system.

120. Lastly, as a means of creating a comprehensive system of compensation for damage caused by violations of human rights by public officials, the national Government is preparing a bill for submission to the legislative chambers whereby it will be empowered to pay compensation recommended by intergovernmental human rights organizations.

Article 15

121. The legal system in Colombia bans from its proceedings statements and other evidence which have been obtained in violation of due process; article 250 of the Code of Penal Procedure thus expressly rejects evidence which:

> "... has been obtained illegally to determine liability. The official shall order the rejection of evidence which is prohibited by law ...".

122. As a safeguard, the exceptions to the obligation to testify are specified, article 283 of the Code of Penal Procedure stating that:

> "No one shall be obliged to testify against himself or against his spouse or permanent partner or relatives to the fourth degree of blood relationship, the second degree of relationship by marriage or the first degree of civil relationship.
>
> The official concerned shall inform of this right any defendant who is to be interrogated and any person who is to give evidence."

123. In addition, according to article 284 of the Code of Civil Procedure, the following are exempted from this duty on account of their occupation or profession:

> "The following are not obliged to testify concerning what has been told them in confidence or has come to their knowledge by virtue of their ministry, profession or functions:
>
> 1. Ministers of any religion recognized by the Republic;
>
> 2. Advocates;
>
> 3. Any other person who by law can or must observe secrecy."

124. The Supreme Court of Justice (Criminal Division, judgement of 24 March 1983), comments as follows on this matter:

> "Neglect of this formality by the examining magistrate or official does not in itself affect the validity of the evidence nor of the case record to which he has access, though the person concerned may indeed, by failing to carry out this duty, have committed a disciplinary fault. On the other hand, if a person who knows that he is exempted from the obligation to testify is by some means compelled to do so, not only is the legality of the proceedings invalidated, but the examining magistrate or official who proceeds in such a way would be committing an offence."

125. Article 296 of the Code of Penal Procedure stipulates as one of the requirements that a confession should meet:

"4. That it should be made consciously and freely."

126. On this point, legal doctrine comments that the confession must be correct, sincere and truthful, because in the other contingencies described by the author the confession is not recognized by the court, which must elucidate the facts with other items of probative evidence, since it is not acceptable for the purposes we are considering to admit what are called forced, imaginary, unwitting, untrue, involuntary, rash, partial, or tacit confessions, confessions due to laxity, etc., but on the contrary the confession must be complete and genuine.

Article 16

127. In Colombian punitive legislation provision is made for the application of the ordinary system of penal justice to all persons who commit punishable acts and come under its jurisdiction, i.e. do not have the right to be tried by special courts as in the case of military personnel, who, as laid down in the political constitution, must be tried by military courts when their acts are committed in the course of duty.

128. With respect to the investigation of other acts that constitute cruel, inhuman or degrading treatment or punishment but are not definable as torture, the penal legislation has provided for this category in Chapter 3 of Book 2, on protection of "personal autonomy", which does not preclude, as is indeed explained in article 279 of the Penal Code, the applicability of different penal categories in the event that the offence is subject to a severer penalty and that its definition corresponds to the unlawful act committed by the agent. Within these categories are included the offences enumerated in Title X against personal freedom and other guaranteed rights, and the offences against life and personal integrity that are dealt with in Title XIII of the Penal Code.

List of annexes*

1. Political Constitution of Colombia, 1991

2. Act 65 of 1993 establishing the penitentiary and prison code.

3. Preliminary agreement on the rules governing the Code of Penal Procedure.

4. Extradition conventions and treaties adhered to bilaterally by Colombia.

5. Act 49 of 1982 approving the Inter-American Convention on Proof of and Information on Foreign Law.

6. Act 21 of 1981 approving the Inter-American Convention on General Rules of Private International Law.

7. Act 16 of 1981 approving the Inter-American Convention on Extraterritorial Validity of Foreign Judgements and Arbitral Awards.

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* These annexes are available for consultation in the archives of the United Nations Centre for Human Rights.